

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
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In Reply Refer To:
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February 28, 2003

EMS
Instruction Memorandum No. ID-2003-036
Expires: 09/30/2004

To: Chief, External Affairs and District Managers
Attn: Public Affairs Officers and FOIA Coordinators

From: State Director

Subject: Congressional Freedom of Information Act (FOIA) Requests for Records

Program Area: External Access to BLM Information and Congressional Correspondence

Purpose: This IM serves to remind you of the procedures for processing record requests from members of Congress that contain proprietary/confidential or sensitive information.

Policy/Action: We process a request from an individual member of Congress like all requests for proprietary/confidential or sensitive information and forward it to FOIA/Privacy Act Specialist Linda Matthews (ID-954). A request from a committee or subcommittee of Congress is treated separately, because the FOIA does not give authority to withhold information from a Congressional Committee. Therefore, if a request is received from a Congressional Committee or Subcommittee for proprietary/confidential information, the request is granted. Follow the special handling procedures as outlined in BLM Manual 1278.41.

Timeframe: The direction in this IM is in accordance with the BLM Manual 1278.4 – Congressional FOIA Requests and is already effective.

Background: The attached Office of Information Policy guidance provides you the pre-existing requirements on this issue.

Manual/Handbook Sections Affected: This IM does not constitute a change to existing policy; it ensures compliance.

Coordination: The WO FOIA Administrator (WO-560), Idaho FOIA Coordinators, the Chief of External Affairs (ID-912), and the Human Resources Specialist (ID-953) received a draft copy of this IM. Comments and suggestions are included in this final version.

Contact: For further information or if you have any questions about congressional FOIA requests, contact Linda Matthews, State FOIA/Privacy Act Specialist (ID-954), at (208) 373-3947 or by e-mail.

Lower Snake River District with Union: No Union notification or negotiation is required.

Signed
Anna F. Steele
for K Lynn Bennett

Authenticated
Shellie Hartsock
Division Secretary

Attachment (4 pp)

OIP Guidance

Congressional Access Under FOIA

A particularly delicate issue arising under the Freedom of Information Act is the proper treatment of FOIA requests received from Members of Congress. Such requests may be made for a variety of different purposes--such as in aid of a specific or general legislative function, on behalf of a constituent, or even as a matter of a Member's primarily personal interest. In responding to such requests, with their inherent implications for Executive/Legislative Branch relations, federal agencies can face troubling disclosure decisions and are often uncertain as to where they should, or must, "draw the line."

Fortunately, the FOIA contains language within its subsection (c) specifically addressing the subject of congressional access. The exact meaning of this language, though, is less than crystal clear, as it succinctly states only that "[the FOIA] is not authority to withhold information from Congress." 5 U.S.C. §552(c). Such phrasing leaves somewhat unclear exactly which requests should be treated as special ones "from Congress." Unfortunately, this has been clouded even further by the D.C. Circuit's highly questionable opinion in *Murphy v. Department of the Army*, 613 F.2d 1151 (D.C. Cir. 1979).

THE MURPHY DECISION

In *Murphy*, a FOIA requester argued that the Army had "waived" its right to protect requested records under Exemption 5 because it had provided the records to a Member of Congress. *See* 613 F.2d at 1155. While the congress man involved had an undeniable official interest in the records' subject matter (a proposed public works project within his district), it was undisputed that he had obtained them in his capacity as an individual Member, not through a formal committee or subcommittee request. *See id.* at 1153 & n.2.

In an opinion written by District Court Judge Harold H. Greene (sitting by special designation), the D.C. Circuit refused to find "waiver" under such circumstances, but it did so by relying exclusively on the operation of FOIA subsection (c). *See id.* at 1155-56. In so doing, Judge Greene's opinion interpreted subsection (c) expansively, suggesting that it require unexempted FOIA access for any request made by a Member of Congress in his or her official capacity. *See id.* at 1156-58.

To be sure, the "non-waiver" outcome reached in *Murphy* seems entirely correct, particularly according to the law of waiver as it has developed under the FOIA. *See FOIA Update*, Spring 1983, at 6. But the *Murphy* opinion's analysis and application of subsection (c) are quite troubling. In the past, the Department of Justice has not fully confronted *Murphy*, but instead strained to minimize its significance to subsection (c) determinations by rationalizing that

subsection (c) "was not indispensable" to *Murphy's* outcome. *FOIA Update*, Summer 1980, at 4. However, there is just no getting around the fact that the *Murphy* opinion, on its face, is based entirely upon its aberrational reading of subsection (c), and this has given pause to many agency officials considering access requests from individual Members of Congress.

THE PROPER SUBSECTION (C) "LINE"

Therefore, so that there should no longer be any doubt or hesitation among federal agencies on this point, it is now stated unequivocally, as a matter of Department of Justice FOIA policy, that the "line" within subsection (c) should be drawn between requests made by a House of Congress as a whole (including through its committee structure), on one hand, and requests from individual Members of Congress on the other. Even where a FOIA request is made by a Member clearly acting in a completely official capacity, such a request does not properly trigger the special access rule of subsection (c) unless it is made by a committee or subcommittee chairman, or otherwise under the authority of a committee or subcommittee. Insofar as the *Murphy* opinion indicates otherwise, it should not be followed.

This approach to the issue, *Murphy* notwithstanding, is strongly compelled by several considerations. First and foremost, the FOIA's legislative history makes it clear that precisely such a construction of subsection (c) was intended. *See* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11-12 (1966) ("Members of Congress have all of the rights of access guaranteed to 'any person' [under the FOIA], and the Congress has additional rights of access to all Government information which it deems necessary to carry out its functions."); S. Rep. No. 813, 89th Cong., 1st Sess. 10 (1965); *Federal Public Records Law: Hearings an H.R. 5012, et. al. Before Subcomm. of the Government Operations Comm.*, 89th Cong., 1st Sess. 23 (1965) (Statement of Rep. Moss). *See also* 5 U.S.C. §552a(b)(9) (identical "line" drawn under the Privacy Act of 1974).

Such a construction also fully comports with the access rules traditionally applied in non-FOIA contexts, which limit congressional access along exactly the same lines. *See, e.g., Exxon Corp. v. FTC*, 589 F.2d 582, 592-94 (D.C. Cir. 1978) ("The principle is important that disclosure of information can only be compelled by authority of Congress, its committees and subcommittees, not solely by individual members."), *cert. denied*, 441 U.S. 943 (1979); *see also Liveright v. United States*, 347 F.2d 473, 474-75 (D.C. Cir. 1965) (congressional subpoena not valid unless issued by subcommittee chairman with full, express authority of subcommittee). Indeed, this rule was expressly applied in a recent decision denying Senator Jesse Helms' non-FOIA bid for special access to FBI records on Martin Luther King, Jr. *See Lee v. Kelley*, 99 F.R.D. 340, 342-43 & n.2 (D.D.C. 1983), *petition for mandamus denied*, No. 83-2090 (D.C. Cir. Oct. 19, 1983) (appeal docketed, Nos. 83-2141, 83-2142 (D.C. Cir. Oct. 28, 1983)).

FOIA PRACTICE

It is also significant that several FOIA requests from individual Members of Congress have been litigated through the years, including requests unquestionably made in a Member's official capacity, without it ever having been held that such requests qualify for special access under subsection (c). *See, e.g., Aspin v. Department of Defense*, 491 F.2d 24, 26 (D.C. Cir. 1973); *Mink*

v. EPA, Civil No. 71-1614, slip op. at 1 (D.D.C. Aug. 27, 1971) (rejecting such a special access argument), *rev'd on other grounds*, 464 F.2d 742, 744 (D.C. Cir. 1972), *rev'd on other grounds*, 410 U.S. 73 (1973). *Cf. Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 300 (D.D.C.), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976). It is therefore not at all surprising that the contrary interpretation of subsection (c) employed in *Murphy* was pointedly and persuasively criticized in a subsequent D.C. Circuit case. *See FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 978-79 (D.C. Cir. 1980) (Wald, J., concurring in part, dissenting in part).

Moreover, such a demarcation within subsection (c) is most sensible from a practical standpoint as well. Were the "line" to be drawn otherwise, then any individual Member of Congress, acting out of some official interest in the subject matter of an agency record, could personally compel its disclosure without regard for its exempt status under the FOIA. Such a practice would not only pose a myriad of difficulties for federal agencies, it would be directly contrary to the traditional manner in which the Executive and Legislative Branches interact. *See, e.g., Exxon Corp. v. FTC*, *supra*, 589 F. 2d at 592-94; *see also FTC v. Owens- Corning Fiberglas Corp.*, *supra*, 626 F.2d at 978-79 (Wald, J.).

DISCRETIONARY DISCLOSURE

This is not to say, however, that agencies are without discretion to make broad FOIA disclosures to individual Members of Congress under appropriate circumstances. *Accord Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979) (FOIA exemptions are discretionary, not mandatory). Recognizing the importance of federal information flow to effective congressional relations, Executive Branch agencies should of course give very careful consideration to any access request received from a Member of Congress, with discretionary disclosure often a possibility. And where an agency makes such a discretionary disclosure in furtherance of a legitimate governmental interest, together with careful restrictions on further dissemination, it should be able to resist an argument that such action constitutes a "waiver" of FOIA exemptions. *See FOIA Udate*, Spring 1983, at 6.

On the other hand, however, agencies must remember that certain types of information exempted under the FOIA are prohibited from disclosure by other rules or statutes, *see, e.g.*, Rule 6(e) of the Federal Rules of Criminal Procedure (grand jury information), and that agency discretion to disclose such information is necessarily circumscribed, *see, e.g., United States v. Sells Engineering, Inc.*, 103 S. Ct. 3133, 3140-49 (1983) (strict limitations placed on disclosure of grand jury information). Moreover, even where the special congressional access rule of subsection (c) is clearly applicable, an agency could still refuse to disclose requested information based upon an authorized assertion of executive privilege by the head of the agency. *See* President's Memorandum for the Heads of Executive Departments and Agencies Re: Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982) (requiring specific Presidential authorization for any invocation of executive privilege in response to a congressional access request).

CONCLUSION

In sum, when an agency receives a FOIA request from a Member of Congress, it should first determine whether it is a duly authorized request on behalf of Congress through a legislative committee or subcommittee. If so, then the request falls within subsection (c) of the FOIA and only a specially authorized claim of executive privilege could be interposed to justify nondisclosure. Any FOIA request submitted by the chairman of a committee or subcommittee on a subject within its jurisdiction should routinely fall into this category. On the other hand, if the request is not an official committee or subcommittee request, then the agency should process it as a request from "any person" under the FOIA, but with particular regard for the considerations of congressional relations, discretionary disclosure and waiver referred to above.

This guidance clarifies and updates the Department's 1980t policy statement on this subject, in which the same statutory interpretation was suggested.